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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 6, Original.

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF MISSISSIPPI.

REPORT OF COMMISSIONERS APPOINTED TO RUN, LOCATE AND DESIGNATE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

SAMUEL S. GANNETT,
CHARLES H. MILLER,
STEVENSON ARCHER, JR.,
Commissioners.

Filed September 30, 1920.

Office Supreme Court, U. S.
FILED
DEC 20 1920
JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 6, Original.

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF MISSISSIPPI.

EXCEPTIONS OF DEFENDANT, THE STATE OF MISSISSIPPI, TO THE REPORT OF SAMUEL S. GANNETT ET AL., COMMISSIONERS.

FRANK ROBERSON,
Attorney General of Mississippi;
MARCELLUS GREEN,
GARNER W. GREEN,
Counsel for Defendant.

MAYNARD & FITZ GERALD,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 6, Original.

THE STATE OF ARKANSAS, COMPLAINANT,

vs.

THE STATE OF MISSISSIPPI, DEFENDANT.

EXCEPTIONS OF DEFENDANT, THE STATE OF MISSISSIPPI, TO THE REPORT OF SAMUEL S. GANNETT ET AL., COMMISSIONERS.

Now comes the State of Mississippi, by its Attorney General, and respectfully represents that in the above-entitled cause a report was assumed to be made by the commissioners upon the 30th day of September, 1920, and was on that day presented to this court for its action in the premises.

That at said report this exceptor feels aggrieved, and respectfully represents that said report is not in accordance with law, and the decree of reference made by this court, and for cause of exception states the following:

1. Exceptor represents that said commissioners designated by this court in the preparation of their said report, after due request of them made for the right to the State of Mississippi to be present by its counsel before them, the said commissioners, and to present to them, the said commissioners, the evidence of witnesses whereunder this exceptor hoped to sustain its exceptions, and by which its advice it ought to have so done, and to have said commissioners hear its counsel with reference to questions of fact to be by said commissioners found, yet, contrary to the order of submission and the rights of the State of Mississippi, said commissioners refused so to do, and submitted said report without vouchsafing to the State of Mississippi the right either to be heard by its counsel or to present to the commissioners the evidence which it had collected and which it desired to present, all greatly to the detriment of said State.

2. Said exceptor, the State of Mississippi, further protests against the confirmation of said report, because in the preparation thereof it was denied the right to be heard with its witnesses in accordance with section 6 of the decree of this honorable court, entered upon March 22, 1920.

3. Exceptor further represents that the provisions of said decree of reference made by this honorable court are violated in this that no return whatsoever is made of any of the evidence which was taken by said commissioners, and upon which they, said commissioners, without the presence of said exceptor, assumed to base their findings, and that contrary to the decree of this honorable court, said evidence, upon which said alleged facts set forth in said report are sought to be supported, are not submitted to this court for the basis of these exceptions.

4. Said State of Mississippi represents that the commissioners state in said report their conclusions of law only,

without setting forth in detail and at length the evidence of the facts, and the facts upon which such conclusions are based when they caused the line recommended to deviate from that which would ultimately have been the line adopted.

5. Said State of Mississippi excepts to the finding that the avulsion occurred in 1884, when the map in the possession of this court shows such avulsion to have occurred at an earlier date, *i. e.*, about 1840.

6. Said exceptor further excepts to the said report, because, under section 1 of the decree, the boundary line between the States aforesaid was fixed as the middle of the steamboat channel as it existed at the Treaty of Peace concluded between the United States of America and Great Britain in A. D. 1783, subject, nevertheless, to such changes in said boundary as may have occurred otherwise than by avulsion, and said commissioners wholly failed to integrate into said boundary as found in said report the fact that in 1816, and prior thereto, there had existed an island in the middle of the Mississippi River so situated as that the navigable channel ran to the north thereof, and that this must have been and was the channel of commerce, and the existence of said island is wholly disregarded in the report of said commissioners, contrary to the facts.

7. Because the commissioners were without adequate evidence to locate the steamboat channel.

8. Because there is not in the record and in the report of the commissioners adequate evidence to locate, with reasonable certainty, the steamboat channel which was made by this court the basis of the location for the boundary.

9. Because the present location of the deepest water in and about this vicinity is not adequate aquarium to deter-

mine where the steamboat channel was at the date of the avulsion, for certainly that channel did not lay along the outside of the bends of the river as it then existed, but lay as close as possible to the inside of the bends so as to make the shortest runs for the boats navigating the river.

10. Because there is no evidence to support with reasonable certainty the assumed location of the alleged line south of Monument No. 2, thence to the end of said alleged line in the Mississippi River.

11. There was a total disregard of the direction of the decree of this court in this that said boundary was by said commissioners laid out along an alleged deep-water channel, and not along the channel of commerce, which is the controlling factor under the decisions of this court, and especially as that channel must have been north of the island shown on the map of Arkansas made in 1816.

12. The said alleged boundary line beginning at the north on the west side is too far west after it crosses the present shore line, and so continues too far west until it turns to the east, when it is much too far to the south, and so continues until it turns to the north, when it is much too far to the east, and should be moved to the west.

13. Because, under the facts, as they exist, the line was not located midway between the permanent banks of the Mississippi River, as there is no evidence submitted to locate, with reasonable certainty, the channel of commerce or the steamboat channel.

14. Because said commissioners failed to return divers local maps and other data to this court as a portion of their said report when so thereunto required by the decree herein made.

15. Because the extent of the preliminary investigations with the evidence thereupon adduced, are not returned to this court.

16. Because no notice was ever served upon the State of Mississippi to be present at any time or at any place, then and there to present its contentions to the commissioners so that they might be properly informed, and have it present whatever evidence it might have had so that the same could have been considered.

17. Because the finding of law upon page 3 of the report as to the boundary line is not in accordance with the decisions of this court and the decree of record.

18. Because the commission erred in following as the boundary line the present line of deepest water.

19. Because, by reason of its location, it could not possibly have been the channel of commerce at the date of the avulsion.

20. The line of navigation pursued by steamboats after the avulsion is wholly immaterial, and should not in any way be made a part of this report.

21. The commission erred in locating under similar circumstances the boundary nearer the Mississippi bank than to the Arkansas bank.

22. Because, as shown by Exhibit "A" hereto, certificate of the Auditor of the State of Arkansas, the State of Arkansas has not paid any amount to said commission, but that a party, as the State of Mississippi is advised, in interest, advantaged by the rendition of the decree, has paid to the commissioners an excessive compensation before confirmation of their report by this court.

23. And for divers other grounds appearing to be assigned at the hearing.

Wherefore, exceptor, the State of Mississippi, moves that said report be not received but be recommitted to the commissioners for further action in accordance with these exceptions, and that they be required to report to this court in accordance with the decree of record, and be required to introduce in this court with their report all data, maps, and evidence upon which the same were taken, and that this court vouchsafe to this exceptor, the State of Mississippi, the right to be heard before said commissioners, and to have this evidence submitted to and considered by said commission.

Respectfully,

FRANK ROBERSON,
Attorney General of Mississippi;
MARCELLUS GREEN AND
G. W. GREEN,
Of Counsel.

MAYNARD & FITZ GERALD,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 6, Original.

STATE OF ARKANSAS

vs.

STATE OF MISSISSIPPI.

I, the undersigned Auditor of the State of Arkansas, charged by law with the disbursement of the funds of said State, hereby certify that there has not been paid by the State of Arkansas the sum of six thousand one hundred sixteen dollars and forty-five cents ($6,116.45) in the above-entitled cause, embracing the following items:

1.	Stevenson Archer, Jr., traveling and miscellaneous expenses	$88.95
2.	Hotel Alcazar, room rent	54.60
3.	S. S. Gannett, pay as commissioner	500.00
4.	S. S. Gannett, traveling and miscellaneous field expenses	188.13
5.	Stevenson Archer, Jr., traveling expenses	58.41
6.	S. S. Gannett, pay as commissioner	275.00
7.	James F. Fontaine, surveying	201.60
8.	Stevenson Archer, Jr., pay as commissioner	1,000.00
9.	Hotel Alcazar, room rent	92.45
10.	E. L. Fontaine, pay as consulting engineer	90.00
11.	Charles H. Miller, pay as commissioner and miscellaneous expenses	841.06
12.	Charles H. Miller, pay as commissioner and miscellaneous expenses	494.15
13.	Stevenson Archer, Jr., pay as commissioner and miscellaneous expenses	532.68

14. Hotel Alcazar, room rent and telephone....	51.95
15. James F. Fontaine, pay as surveyor and miscellaneous expenses	306.33
16. S. S. Gannett, traveling and miscellaneous field expenses	341.14
17. Stevenson Archer, Jr., pay as commissioner.	250.00
18. S. S. Gannett, pay as commissioner.....	750.00

And that said State of Arkansas has not paid any portion of said amount through the official channels of said State, and that I am the lawful custodian of vouchers, and certify as lawful custodian of same.

Given under my hand and seal this 24th day of November, 1920.

[Seal of the Auditor of State, Arkansas.]

HOGAN OLIVER,
Auditor of State,
By C. C. SMITH,
Deputy.

[Endorsed:] Supreme Court U. S., October Term, 1920. Term No. 6, Original. The State of Arkansas, complainant, *vs.* The State of Mississippi. Exceptions of defendant to report of commissioners. Filed December 20, 1920.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 6, Original.

STATE OF ARKANSAS, *Complainant,* vs. STATE OF MISSISSIPPI, *Defendant.*	In Equity.

MOTION FOR CONFIRMATION OF REPORT OF COMMISSIONERS AND SUGGESTIONS IN SUPPORT OF SAME.

J. S. UTLEY,
Attorney General.
J. M. MOORE,
HERBERT POPE,
Solicitors for State of Arkansas.

BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 6, Original.

STATE OF ARKANSAS, *Complainant,* **vs. STATE OF MISSISSIPPI,** *Defendant.*	**In Equity.**

MOTION FOR CONFIRMATION OF REPORT OF COMMISSIONERS.

Now comes the complainant, State of Arkansas, and shows that the Commissioners, heretofore appointed by this court in and by its decree entered herein on March 22, 1920, have made a report in accordance with the provisions of said decree, and that the defendant, State of Mississippi, has heretofore filed herein certain exceptions to said report.

Wherefore complainant moves that each and every one of the exceptions to said report of said Commissioners be overruled by this court, that said report be in all respects confirmed, and that this court determine how the costs of this suit shall be borne by the parties

hereto and take such further action in this cause as may seem to it just and proper.

STATE OF ARKANSAS,
By J. S. UTLEY,
Attorney General.

J. M. MOORE,
HERBERT POPE,
Solicitors for State of Arkansas.

SUGGESTIONS IN SUPPORT OF THE ABOVE MOTION.

We respectfully submit that the exceptions to the report of the Commissioners filed by the defendant are without merit and should be overruled.

The decree under which the Commissioners were appointed did not require the taking of additional evidence and did not give either party the right to produce witnesses before the Commissioners or to have a hearing. The decree merely empowered the Commissioners "to take such additional evidence under oath as may be necessary and authorized to enable said Commission to determine said boundary line." Indeed, it is doubtful if the Commissioners were authorized to take any additional testimony, in view of the fact that the evidence in this case had already been taken under an order of this court (Rec., 22-23), made in pursuance of a stipulation between the parties (Rec., 21), appointing Omar L. Jewell commissioner to take and return the testimony in this cause. The case has been submitted to this court upon the evidence so taken, and the interlocutory decree appointing the Commissioners did not give either party the right to try the case over again.

In support of the conclusions of the Commissioners which are complained of by the defendant we refer to the brief and argument for complainant filed on the hearing of this cause in this court.

We submit that this court is not concerned with arrangements made by the complainant to enable it to pay the costs of this proceeding. The court is advised that in almost all state boundary controversies private parties are necessarily interested, and has been advised of the interest of private parties in both Mississippi and

Arkansas in this proceeding by the suit of *Rust Land & Lumber Co.* v. *Jackson, et al.* 250 U. S. 71, heard at the same time that this cause was presented to this court. Only by this proceeding could the State of Arkansas have finally determined the location of the true boundary between the two states and protect all persons claiming under it.

We ask that the costs of the parties be determined by this court and that the report of the Commissioners be affirmed.

Respectfully submitted,

STATE OF ARKANSAS,
By J. S. UTLEY,
Attorney General.

J. M. MOORE,
HERBERT POPE,
Solicitors for State of Arkansas.

Office Supreme Court, U. S.
FILED
FEB 26 1921
JAMES D. MAHER,
CLERK

In the Supreme Court of the United States

NO. 6 ORIGINAL, OCTOBER TERM, 1920.

STATE OF ARKANSAS

v.

STATE OF MISSISSIPPI

BRIEF IN SUPPORT OF EXCEPTIONS TAKEN TO COMMISSIONER'S REPORT FOR STATE OF MISSISSIPPI.

FRANK ROBERSON, *Att'y.-General.*
MARCELLUS GREEN,
GERALD FITZGERALD,
GEORGE F. MAYNARD,
GARNER WYNN GREEN,
Attorneys for State of Miss.

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In the Supreme Court of the United States

NO. 6 ORIGINAL, OCTOBER TERM, 1920.

STATE OF ARKANSAS

v.

STATE OF MISSISSIPPI

BRIEF IN SUPPORT OF EXCEPTIONS TAKEN TO COMMISSIONER'S REPORT FOR STATE OF MISSISSIPPI.

STATEMENT OF THE CASE.

The Original Bill was filed by Arkansas against Mississippi to delineate the boundary at Horseshoe Bend; such proceedings were had herein that an opinion was rendered May 19th, 1919, (250 U. S., 832) and by an interlocutory decree of reference of March 22nd, 1920, (___ U. S. ___) Samuel L. Gannett, Charles H. Miller and Stephen Archer, Jr., were appointed Commissioners, who reported September 30th, 1920, to which Mississippi has filed exception, while Arkansas has moved to confirm. This hearing covers the exceptions and opposition to confirmation, Mississippi urges:

POINT I.

The Commissioners erred in this; they gave no notice whatsoever to Mississippi of the time, place and procedure of their several meetings. After due request by Mississippi for such an opportunity to present evidence, whereunder exceptor would sustain its contentions, to have its counsel heard as to proper finding of facts, and to present its contentions, the Commission, contrary to the order of submission and rights of exceptor, denied these rights and a report was made whereby all contentions of exceptor were disregarded (Exceptions 1 and 2).

POINT II.

The Commissioners erred in this; they violated the law and decree of reference in making no return of local data and maps examined as a basis of the report; this being done without the presence of exceptor, and, though the report is based thereupon, such data and maps are not returned therewith, nor was counsel for exceptor vouchsafed right of examination (Exception 3).

POINT III.

The Commissioners erred, in this; said report embodies conclusions of law and not findings of fact. (See Exception No. 4).

POINT IV.

The date of the avulsion given is erroneous. (Exception No. 5).

POINT V.

The boundary is incorrectly located; and the location, as made, is conformable neither to the decree nor the law. (See Exceptions 6 to 21).

POINT VI.

The report should be set aside, and a new Commission named, because of the conduct of Rust Land and Lumber Company in making payment to Commissioners of amounts, not agreed to by Mississippi, at a time when Mississippi was unable to pay, by reason of want of an appropriation, and the payment of the amount by Mississippi was deemed excessive.

ARGUMENT.

POINT I.

The Commissioners erred, in this, they gave no notice whatever to Mississippi of the time, place and procedure of their several meetings, after due request by Mississippi for such an opportunity to present evidence, whereunder exceptor would sustain its contentions, to have its counsel heard as to a proper finding of facts and law, the Commission, contrary to the order of submission and rights of exceptor, denied these rights, and a report was made whereby all contentions of exceptor were disregarded.

(A). No notice was given Mississippi of the time, place and/or manner of procedure by the Commissioners in this cause—not one of whom had been by Mississippi named, though two were nominated by Arkansas. Fundamental justice requires *"Audi alteram partem." Broom's Maxims* 113; wherefrom this appropriate quotation is made:

Quicunque aliquid statuerit, parte inaudita altera,

Aequum licet statuerit, haud aequus fuerit.

See *Lutz v. Linthicum*, 8 Pet. 179, where this principle is announced: "Without question due notice should be given of the time and place for hearing the cause; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." S. C. 2. Rose's Notes (2nd Ed.) 1289; 34 Cyc. 812, Sec. C, 814; Sec. F, 821, Sec. L, 826, Sec. 0; *Taylor v. Wright* 54 Miss. 727

(B). As soon as Mississippi became aware of the Commission being in session, without waiting for notice further, it applied for an opportunity to be heard, and was respectfully advised, that the report had been completed, and that the Commissioners did not consider that the decree vouchsafed Mississippi any such rights. Thus a finding of fact, *prima facie* correct, has been made, and which is reported for adoption by decree herein. Surely the right to be heard was intended to be given, and Counsel should have been allowed to be present and present their cause. 34 Cyc. 826. Of course it may have been more expeditious to have denied the right, but constitutional limitations demanded this privilege.

The Commission was the tribunal by which the parties were to be heard. Under this Report the hearing must be had by this Court. This Court under the decree of reference was to be a Court of review—not the trial Court.

This is especially true where, as here, no appropriation had been made by Mississippi for presenting its cause to the Commissioners while an interested party, Rust Land & Lumber Company, had been at great pains and expense to see that everything supporting the contention of Arkansas was laid before this Court, having employed all expert witnesses. It will be seen from the

report, that the Commissioners read only "the record," and did not consider briefs of counsel for Mississippi, or Arkansas, but made their decision, upon the facts based upon, in part "Local data and maps," which are not returned to this Court, nor seen by counsel for Mississippi; thus Mississippi is condemned by to it unknown evidence, examined by the Commissioners, and with no opportunity given to meet the burden thus imposed, and then have Mississippi precluded from questioning the report by its assumed *prima facie* correctness.

Londoner v. Denver, 210 U. S. 373.

POINT II.

The Commissioners erred in this, they violated the law and decree of reference in making no return of "local data and maps" examined as a basis of the report. This was done without the presence of exceptor; and, though the report is based thereon, such "data and maps" are not returned therewith, nor is counsel for exceptor vouchsafed the right of examination.

Section 5 of the decree requires "Said Commission shall give its findings of fact and the evidence on which the same is based."

Prima facie, the line, equidistant between the fixed banks, is the line to be run. Point V herein and authorities there collated. The line delineated by the report varies therefrom; so that, thereby it became requisite to return the evidence upon which this line was based. Again, by the first section of the report, it appears "the record was read, local data and maps were examined and preliminary investigations made in the field." All reflected in this report locating a line, expressly stated to differ from that equidistant between fixed banks.

If additional evidence to that contained in the record, then under Sec. 6 of the decree such "Additional evidence under oath" was to be taken, and the decree required that: "All evidence taken and exceptions thereto

shall be preserved, certified and returned with the report of the Commissioners." These maps and this local data integrated into the report have not been so returned, and, contrary to the express terms of the decree, counsel for Mississippi were not even allowed to see these "maps and this local data," much less were they given permission to attend by "Counsel and cross examine the witnesses" produced before the Commission.

POINT III.

The Commission erred, in this, said report embodies conclusions of law and not findings of fact.

It declares:

> "The determination of the boundary line proceeded upon the finding of law as laid down by the Court, viz: That if the former channel of a river separating two States ceased to be navigable by reason of an avulsion, it does not render inapplicable the rule which fixes as the boundary line the middle of the navigable channel rather than the middle line between the banks (*State of Arkansas v. State of Tennessee*, 246 U. S., 158, Section 4.)"

The Commission was not vested with authority to examine and declare the law. Under Section 5, all that was given to the Commission was the right to "give its findings of fact and evidence on which the same was based," and the assumption by the Commission shows that it has misconstrued the law by failure to note the authorities collated under Section V hereof.

POINT IV.

The date of the avulsion given is erroneous.

Issue being joined as to the date of the avulsion, Complainant must prove it, and the sole declaration in the record as to the avulsion being 1848 was a report "Upon

the Physics and Hydraulics of the Mississippi River," made in 1861 in which it is stated: "Horseshoe Cut Off between Island 60 and 61, date 1848, length of bend, eight miles."

Now in contradiction thereof, we have from Col. Ockerson:

(1). "Q. As a matter of fact, you do not know whether the cut off occurred in 1848?
"A. Not personally." (Tr. p. 51).

(2). Mr. Hoffman, complainant's witness (Tr. 179) upon authority of Henry Wills, deceased, placed the date between 1844 and 1848.

(3). Lige Miller, disinterested, a resident of the vicinity since 1845, said:

"Q. And the cut off was there when you came here?

"A. Yes sir; it was there when I came here in 1845. I do not know how long before, but it was there when I came."

This old man reiterated this statement upon cross examination (Tr. 212); and this constitutes really the only legally competent testimony before the Court. He knew the conditions and without attempting to say when, *upon information,* stated, *as of knowledge,* what he had seen upon this fact.

(4). E. L. Fontaine (Tr. No. 308) testified that the cut off occurred, according to the best data obtainable about 1838, and in support thereof produced a chart, prepared by Thos. H. Turrett of Settlements on the Mississippi (Tr. 315), now the property of the Levee Board which sustained his statement. While there was no date upon the map, this is shown by the County Site at the time.

(5). Mr. Fontaine further testified: "I would state that I had a map in my possession about two months ago that showed practically the same thing that that map shows, with the exception of the number of bales of cotton that were raised, and that map was published in 1839, at Mobile, Alabama."

(6). Turrett's map of the State of Mississippi, anterior to 1848, produced under the order of this Court as a part of the record, shows the cut off as of a date prior to 1847. The original is on file in this cause.

Issue, therefore, being made upon the date of the avulsion and in support of the date but one hearsay statement was made from an authority which shows that date; but in contradiction, we have the positive testimony of a disinterested witness, supported by at least three maps, all antedating 1848, and, with greatest deference, the makers of these maps would not have had the temerity to have forecasted this cut off in their delineations. These maps exclude any possible contention to the contrary, and make uncertain the avulsion date to the extent of many years—certainly ten. Therefore when the Commission finds the channel at the date of the avulsion of 1848, they commit an anachronism. It had already happened many years prior thereto.

POINT V.

The boundary is incorrectly located; and the location, as made is conformable neither to the decree nor to the law.

The boundary line to be delineated was placed "along the middle of the river," and along "the middle of the main navigable channel" (250 U. S., 43), i. e., the middle of the channel of traffic.

Furthermore, as said in the principal opinion, "The controlling consideration is that which preserves to each State equality in the navigation."

Returning to *Iowa v. Illinois*, 147 U. S., 13, as the leading case, it is therein accurately said, viz:

> "But we are of opinion that the controlling consideration in this matter is that it preserves to each State equality in the right of navigation in the river. We, therefore, hold in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the 'mid-channel', and, *if there be several channels* to the middle of the principal one, or rather, the *one usually followed.*" (Italics ours).

This is the fundamental rule, but it is necessary that this channel, with reasonable certainty, be located.

A further definition of such traffic channel is quoted by this Court with approval, from *Dunleith, etc., Bridge Co. v. Dubuque County*, 55 Iowa, 564, as one due to the "changing character of the currents of the river followed by vessels, caused by the shifting of nature of the sand bars found in the river."

> "'The course of navigation', it is said, 'which follows what boatmen call the channel, *is extremely sinuous* and *often changing*, and is unknown except to the experienced navigators . . . . It cannot be possible that Congress and the people of the State, in describing its boundary, used the word 'channel' to describe the *sinuous, obscure,* and *changing* line of navigation, rather than the broad and distinctly defined bed of the main river." (Italics ours).

But, notwithstanding the difficulty in such location, this Court held the necessity to vouchsafe equality in navigation rendered requisite the adoption of such *sinuous, obscure* and *changing* line.

In *Iowa v. Illinois*, 147 U. S., page 9, in the quotation from Creasy, it is said:

> "Formerly a line drawn along the middle of the water, the *medium filum aquae*, was regarded as the boundary line; *and still will be regarded prima facie as the boundary line*, except as to those parts of the river as to which *it can be proved that the vessels* which *navigate* those parts *keep their course habitually* along *some channel different* from the *medium filum*. When this is the case, the middle of the *channel* of *traffic* is now considered to be the line of demarcation." (Italics ours).

Wherefore, *prima facie*, the presumption is that the main traffic channel follows the middle line equidistant between the fixed banks. To overcome this *prima facie* presumption, there must be evidence to remove it, and the evidence requisite to remove the presumption must be as broad as the presumption itself; that is to say, this being the presumptive line of traffic in order to place it elsewhere, in conflict, with the presumption, the evidence must be so strong as to overcome the presumption upon each several aspects covered by the presumption.

Wherein consider:

(1). After the avulsion, the line becomes fixed, therefore, the date of the avulsion should be established by the evidence.

(2). As utilization of navigation by traffic is the criterion; of necessity, the evidence must show the character of traffic then existing to delineate the boundary; in flat boating you must keep out of the main channel while in steam boating normally you should remain therein but in tow boating you must keep out likewise. (Tr. 67).

(3). There is not a line of proof as to the character of vessels navigating this particular reach of the river either in 1817, or in 1839, or in 1848; wherein consider their length, their draught, their method of propulsion, their character of cargo.

(4). There is no proof whatever as to the traffic channel pursued at any of these dates.

(5). There is no proof whatever that there was only one traffic channel at the time of the avulsion, or at the place of delineation. *Iowa v. Illinois,* supra, says: "If there be several channels, to the middle of the principal one, or, rather, the *one usually followed.*" (Italics ours).

(6). There is no proof covering the amount of water passing annually over the *locus in quo*; the direction of the currents therein, and their effect upon the loose silt forming the soil.

(7). There is no adequate explanation with reference to the currents within Mud Lake, so called, which is nevertheless, meandered in 1835 as the eastern line of the River, Mississippi.

(8). There is no evidence in the record as to average, normal distance of the centre of the navigable channel from the high bank, and no one has undertaken to furnish the formula which, to a certain extent, must depend upon the extent of concavity.

(9). Integrated into the solution must further be fact that usually the deep water channel parallels the concave bank, wherefore, consider:

That the Arkansas Fractional Township Four, Range Four, shows a most marked concavity upon (a) the east side, and (b) the west side, (Tr. 655, 659) which apparently were wholly ignored.

(10). An island off the section line between Sections 30 and 31, Township 29, Range 4, West, demonstrates that the current was against the Arkansas shore; where the Commission, despite the testimony of Col. Ockerson

and all the other witnesses to the contrary, located the boundary. So that beginning at the point opposite (73-74) and continuing to the Mississippi River, we have a palpable conflict between the Commission and the expert witnesses, demonstrating the wholly inconclusive character of speculation requisite to locate a constantly changing, sinuous and obscure line, without direct testimony, nearly a century after it had ceased to be.

(11). The Mississippi levee parallels the alleged channel for a long distance, and the effect of scouring, incident to obstruction of flow, is known of all men. Note, specially, where, at the indented point in the levee concrete was requisite to protect.

(12). Note the fact that the Mississippi now runs south only about two miles west of Horseshoe Lake and that in this intervening land there are several large lakes.

(13). The only location of the traffic channel is based upon eight transverses, assuming to locate the deepest channel, NOW, but note,

Transverse No. 1 shows no water at all where the middle of the navigable channel is made to intersect it by the Commission on the east, and apparently the elevation at this crossing point is higher than it is on either side thereof. No channel whatever is shown here.

Transverse No. 2 shows a depth of water of a very few feet at the point where this line approximately crosses, and of very narrow extent, whereas the greater depth of water—the deepest water now—and the widest expanse of water, now, is in the west branch of Horseshoe Lake—both depth and width being disregarded by the Commission in fixation of the deep water channel—that is to say, these two factors have not been given effect.

Transverse No. 3 is located about 3500 feet south of Transverse No. 2 and there is no line run at all between these two to show the depth of water, but with greatest confidence, we assert

(1). That the greatest depth of water between these two is along the western branch of Horseshoe Lake; and,

(2). That this branch is directly south of that which the Commission saw fit to adopt as the deep water channel, and yet projected the line out from the one channel into another further off, across a high intervening obstacle, instead of going directly south.

(3). That this water was not at either point five feet deep, and if the mouth of Horseshoe Lake were again opened, this would have been, as it was on the maps of 1883, no longer an open lake.

Transverse No. 4. This showed a depth of water not equal to ten feet up to this point—in short, for nearly half the distance there was no water ten feet deep—which would not indicate any thing like a navigable channel—if, in fact, there was only one at the time.

Transverse No. 5. It will be seen that this transverse shows a depth of water approximately 19 feet deep—but it will not escape the attention of the Court that this is below where the concreting was done to stop the scouring—so that the nineteen foot water shows naught but a present development due to the proximity of the Mississippi Levee—not a true reflection of a century old condition.

Transverse No. 6 shows only a depth of about 15 feet, and that at a point where there would be great scouring in times of flood due to the position of the levee, and the short distance south west to the Mississippi. Note, the many streams running out upon the map of Fontaine, also, the map of 1883.

Transverse No. 7 shows comparative shallow water while Transverse No. 8 shows the deepest water to be in Dustin Pond, north of the intersection thereof with Horseshoe Lake—so that it might well be that the navigable channel turned through this course.

(14). There is no reference made to the Island in Arkansas plat of 1816, to show whether the channel lay to the north or to the south of that Island—its history is shrouded in mystery.

(15). No integration is made in the report of the inevitable tendency in long bends to form chutes across the point—due to the inevitable tendency of water to seek its level by the shortest route—such route would, under certain conditions, become the main traffic channel. The interrelation between such chute channels and the other channel is not disclosed.

(16). No navigator is introduced to place this channel at any date approximating the cut off.

(17). Speculations of scientists as to the age of trees cannot supply the location of the traffic channel—in short, there is no correlation.

(18). Extent of normal rainfall that would have to be carried off.

(19). Character of formations at mouth of Horseshoe Lake as well as the transformation therein between 1883 and 1916 as shown by the several maps.

Therefore, we have:

The presumption that the traffic channel lies equidistant between the fixed banks. *Iowa v. Illinois*, 147 U. S. 1; *State v. Keane*, 84 Mo. App. 130. To support such equidistant line, we have the following:

(a). The actual fixation of such a line by the conjoint action of the two sovereign States of Arkansas and Mississippi.

Arkansas v. Mississippi, 250 U. S. 45; *Cessill v. State*, 40 Ark. 311; *Deloney v. State*, 88 Ark. 311; *Wolfe v. State*, 104 Ark. 140; *Kinnance v. State*, 106 Ark. 290; *Hearne v. State*, 181 S. W. (Ark.) 291; *Morgan v. Reading*, 3 S. & M. 366; *Commissioners v. Withers*, 29 Miss. 33; *Magnolia v. Mar-*

shall, 39 Miss. 109; *Boone v. Fredrick*, 46 Miss. 9; *Cooke v. State*, 81 Miss. 146; *Richardson v. Sims*, 80 So. (Miss.) 4. Together with the statutes and constitutions as thus construed for all of the years.

(b). We have the location of the island integrated into the decision of this question, and as to it we have absolutely no subsequent history as to what occurred with reference thereto.

Indiana v. Kentucky, 136 U. S., 479; *Missouri v. Kentucky*, 11 Wall., 395.

(c). As said in *Rhode Island v. Moss*, 4 How., 638, "No human transaction, are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in the case of disputed boundary.".

In the instant case, each State adopted this line by the interpretation of the treaties which they deemed proper; and what could be more just, or of greater effect, than to divide the property which has been in constructive possession, in accordance with the fixed banks of the river? Surely no speculation as to the age of a tree upon the land could delineate the traffic channel in the great Father of Waters. *Indiana v. Kentucky*, 136 U. S., 479.

In addition thereto, note, also, the express declaration of that opinion:

"Great changes in the bed of the river were to be expected from the immense volume and flow from its vast watersheds. These watersheds, according to the official report of the Tenth Census of the United

States, cited by counsel, comprise over two thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great water courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous force thus brought into operation."

(d). At the time of acquisition, the Rust Land and Lumber Company bought and paid for only approximately 800 acres of land, and yet seeks by the utilization of this proceeding to bring within the State of Arkansas many thousand acres of land whereover the State exercised no authority whatever.

(e). No assertion of title was made contravening the location at the centre line while there were alive persons who could have testified as to its location—this action is begun only after they have passed away.

Now, we turn to the report of the Commission and challenge it upon the grounds set forth in the Exceptions, because of the fundamental failure to, by presumption, make the traffic channel coincide with the *medium filum aquae*.

(A). There is in this record no data to convince any one, with reasonable certainty, of the line of traffic in 1817. The Commissioners have declared that this boundary should follow "the deepest water in this lake" *at this time*.

The line delineated by the Commission now lies upon that which was SURVEYED as a part of Mississippi in 1833, for a great distance, beginning in Section 35 and

running thence along the meander line to their intersection in Section 12.

Therefore, we have a report by which the *deep* water line in 1916 is made to confer title as of 1817, if the island controlled, or 1838-1848, if it did not.

The fact that at the present time such water has in large measure receded and left bare the land which laid within Mississippi should revest title in Mississippi by reliction. *Hughes v. Burney*, 32 So., 3; *Maw v. Brenau*, 156 N. W., 592; *Marks v. Sambrano*, 170 S. W. 546; *Middicombe v. Rosemiller*, 118 Fed., 96; *Murphy v. Norton*, 61 How., Pr., 197; S. C., 100 N. Y., 424.

City of Buffalo, 99 N. E., 853, does not conflict because the lands there submerged were hopelessly gone, while here they have re-appeared under natural causes and have been located by an actual survey. *St. Louis v. Rutz* 138 U. S., 247, becomes applicable: "It is well settled that the owner in fee of the bed of a river or other submerged land, is the owner of any bar, island, or dry land which subsequently may be uncovered thereon," approving *Murphy v. Norton*, 100 N. Y., 424.

We have a direct invasion by this line of the Commission of that which was surveyed as Mississippi territory. *Ratione cessante lex ipsa cessat.* Such invasion is absolutely unjustified by any evidence which might be founded upon the present location of the deep water in Horseshoe Lake, and which is such a character as not to connote the traffic channel.

Normally the Mississippi River is nearly a mile wide, and this lake has been filled up until it is not near so wide; in addition, the Mississippi Levee has been built approximately parallel to the Southern Bank so as to force the water, in time of flood, back through the channel of the lake, and this would have obtained during a period of a quarter of a century.

An examination of the map made in 1883 shows that almost up to the point at which the lake turns North, it had been full "of live willows and dead stumps." The

Court will note this Exhibit "B," and will further note how far this condition had extended from the point shown upon which the willows are shown to grow there.

Hence, given this condition, there must have been a time when all of Horseshoe Lake, East of the line of demarcation where it was full of dead stumps, had become a portion of the dry land, and, by the filling up of the mouth of Horseshoe Lake, the water had been thrown back and the trees killed and the water again become clear. This could have occurred easily between 1883 and the date of the visitation by the experts for the Complainant.

So from the point where these dead stumps were to the Mississippi River on the East side, we, with greatest deference, contend that this was no criterion because the stumps and willows growing in the water could and would, without doubt, have most materially interfered with the tongue of land which is shown upon the map in question, and we direct especial attention to the fact that this point of land *has advanced* down the lake from 1883 to 1920 when this survey was made.

The Court will see on the map of 1883 that this point of land offset that portion of the Levee which was written Port Royal Break and from that time to 1916, it had extended by following up from this point down to the point as it is shown in the Report of the Commission. There is always a channel on the inside of a levee so situated.

We, therefore, have an annual rain fall here of approximately sixty inches, and the fact that this chute lay along the Mississippi Levee, and in virtue of this condition, a constant operating force to clear out the channel on and near the Mississippi bank.

Who can say but that the water ran down through this chute, scoured out the channel, and determine where the deep water would lie in 1916?

Note, that almost a century lapsed between these two dates. Note, that what is shown as Mud Lake is called

for by the field notes of the United States Government in 1835 as the "Mississippi River," and that it would be impossible for any living witness to delineate what occurred between these dates.

Note, that the meander line of Mud Lake, through Sections 6 and 7, and Horseshoe Lake through Section 12 and 11, is the same high and well defined bank, and in one case there is a complete filling up of the water; whereas in the other there is not.

Again: The Commission has found that the chute or slough indicated on the Eastern side of Sections 10 and 15 in Arkansas was the original channel of the Mississippi River, and we direct attention to the fact that this original channel, so found by the Commission, goes down to a point at which, by reason of subsequently occurring conditions, it has ceased to be well defined; but that, according to some testimony, if projected, it joins the West prong of what is now Horseshoe Lake, and, as well, throws out lines toward the chutes forming the Eastern terminus of Dustin Pond.

If this slough formed the main channel of the Mississippi River, and the Commission found it did (although Col. Ockerson declared it was not such channel but that the channel lay along the chute to the East) it is but reasonable that this channel continued South and joined either Dustin Pond or the Western Chute of Old River, and yet, notwithstanding the adoption of this as the channel, the Commission has thrown the line into the Eastern channel, which is evidently nothing but a present drainage system, developed parallel to the Mississippi Levee and caused by it to be kept clear.

Furthermore, the present condition of the bottom of the Lake—more than half filled up—cannot be accepted as a predicate for the fixation of a channel of traffic, and this Court expressly recognizes that condition in *Indiana v. Kentucky,* 136 U. S., quoted above:

"Great changes in the bed of the river were to be expected from the immense volume and flow from its

vast water sheds. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterward was but the natural effect of the tremendous force thus brought into operation," and the mighty Mississippi could and did alter this silt foundation still more.

This Court cannot overlook the effect of this water upon soil composed entirely of silt; and which, therefore, conformed with each passing year to the change in currents created by the immense amount of water passing over the whole territory, marked and scarred by channels, drains and ditches, and all of these have their origin in conditions which run back but a short period, and are accounted for by the change in waters running over and through them.

Consider the presumption arising from the natural condition, and this presumption has been acquiesced in by the States in their sovereign capacity, through their decisions and by their Constitutions, and is the location of a deep superficial water channel in 1916, to control when the facts that determine the causation of its location are not all placed before the Court?

The closing of the mouth of Horseshoe Lake caused the water to rise, markedly, so that the Lake is very much larger and very much deeper now than it was formerly.

Note, the willow bar that has formed at the Northwest terminus of Horseshoe Lake, and note, how that bar has varied from the formation in 1883, and then consider what could have occurred in this greater length of time.

Furthermore, there is no proof of what the ordinary normal and average depth of the deepest channel of the Mississippi River is, or ought to be or how far. it is off shore.

Profile Line No. 5 at X shows the deepest water to have been approximately 19 feet, and this line is in direct line with the pools of water shown upon the map of 1883, and right around the point where the wash of all the water from this territory would flow toward the Mississippi River southwesterly distant only about two miles, through a chain of lakes.

This is the deepest water shown. The shallowest water on the cross sections beginning at No. 2 was less than five feet at Number 3. This embraced both the East chute and the West chute and the deepest water was in the West fork, but that it was not even ten feet deep.

In other words, if the Commission had followed the line of the *deepest water,* they would have run the boundary line up the West prong and not up the East prong.

Therefore, we have a condition in which the deepest water is not consistently followed because on both Transverse No. 2 and Transverse No. 3, the deepest water is shown to have been in the West prong, and, therefore, should have controlled, if depth were a sole criterion. But the present deep water line should be shown to be coincident with the channel of traffic—this is not done, but, on the contrary, the present deep water is not shown to be representative of the original normal depth of the Mississippi along its traffic channel at the avulsion date, and, more important still, this original traffic channel, if it were such, has not been shown to have remained unchanged by the events of over half a century. Complainant's sole argument is *"post hoc ergo propter hoc."* But the present line of deep water is not consistently followed, where the Commission has placed the line, at the east is in the shallower water and likewise at the western end of the Lake the line should deviate from the centre of Horseshoe Lake into Dustin Pond, as shown upon defendant's map because that is the deeper. It is known of all men that nature never, as is shown by the report of the Commission, runs a channel in a direct, straight line to a point, then turn from that point by another straight line. There is in this record abso-

lutely no proof whatever upon which any such channel of traffic can be constructed. Notice the contention of the complainant as to the delineation of the channel of traffic, and it is shown to be a continuous curve, conforming to the banks of the River, whereas the Commission has seen fit to run the Mississippi into a point, and run it out on a straight line at a fixed angle. With deference, not even a Commission from this Court can so bend the Mississippi to suit its will. The traffic channel, wherever it was, was on a curve crossing and recrossing from side to side but never on a straight line. The report is in hopeless conflict with natural laws. Notice Exhibit No. 1, where the channel is denominated by the red line, and Exhibit "A," where denominated by the broken dashed line—each shows it curved. But where is the proof that there was but one channel of traffic at the date of the avulsion, and if it were so easy to delineate as is here shown, surely the remarks that the channel would be known only to the expert boatmen would not be well founded.

If all that was required would be to run the line at a fixed point, the elaborate system of information, set forth at large by Mark Twain in his Life upon the Mississippi, would be without reason. All that would be essential would be to have a few dry land sailors take the map of the River, and pursue the course of the greatest safety in the midstream, which should be easily marked off. The futility of the plan proposed by complainant is completely answered by "Judge" Clemens, who is a direct authority in this case for defendant.

Note, a few of the inconsistencies—the deep water channel has not been followed at the east end of Horseshoe Lake, but the line has been run across the peninsular extending down into the lake between the Eastern and Western prongs. If depth of water were followed, the line would run through the Western prong directly north to the old channel as located by the Commission.

Note, Transverse No. 4, where the total depth of water is only slightly in excess of six feet, Transverse No. 6,

where it is only slightly in excess of Ten feet, and Transverse No. 7, only about twelve feet, whereas upon Transverse No. 8, there is an elevation in Horseshoe Lake but a depression in Dustin Pond. Such a channel as this would never represent the channel of the Mississippi—its depth is too shallow—its bottom too constricted, its conformation too confined. To delineate the boundary, there must be an extension to the centre of such traffic channel. Now given a body of water that is nearly a mile in width, the transverses shown would be wholly inapplicable—in other words, where the Commission assumed to locate the centre of the traffic channel off the original Arkansas shore the line was made between six hundred and a thousand feet off shore—though there is no proof in this record as to where such line would normally run—and yet here, if it were run "approximately equal to that which is ordinarily found between the main bank and the line of deepest water in the Mississippi River," it would be run at a point where the line would be on dry land, and in other instances where the water would not be deepest. Now as the record shows that there is a distance, which is so approximately equal, then it was radically wrong to allow this to be overcome by these traverses, where the width of the water is not in any case equal to one thousand feet—usually narrower. In other words, if there is such approximate distance, equal say to 600 to 1,000 feet, there is no reason why it should not be applied at all points. But, the record shows no such measurement, and doubtless this is one of the things that was shown by the "Local data and maps" which were not returned by the Commission as a part of their report.

Thus subsequent filling of the River has occurred; integrated into such filling has been the action of the numerous springs in Horseshoe Lake which have always supplied a constant stream of water entering the Mississippi. This attrition upon the silt adequately explains the high banks on each side.

It is true that the South Line of Horseshoe Lake at one time was the south bank of the Mississippi, but the same is true of the south bank of the socalled Mud Lake, whose eastern line is coincident with the meandered line of the Mississippi in 1835, but what does not appear is where the sinuous, traffic channel was when Mud Lake was a portion of the Mississippi, and what was the effect of its being such a portion of the River. The effect of the Arkansas Island of 1816 is not shown, neither the date of the avulsion with certainty, and yet each of these must be known to divorce the traffic channel from the channel that was equidistant between the fixed banks. The present deep water line, even if adopted, which is not the case, would not explain the location of a traffic channel which must have other factors than mere depth —distance is, in some cases, more disastrous than shallow channels—recall Mark Twain's expert pilot, hired at below his usual wage, plowing the midchannel until his compensation was adjusted to his skill, and he promptly dropped into the traffic channel to his employer's advantage.

The Commission has been unfair to Mississippi in the speculations which they made as to the location of the traffic channel especially on the west and south. In locating the line over the eastern fork of Horseshoe Lake, and northward the line is drawn at "A distance which is approximately equal to that which is *ordinarily found* between the *main bank* and the line of the *deepest water* in the Mississippi River." (Italics ours).

At Monument No. 1, this is 600 feet; it increases slightly between Monument No. 1 and Monument No. 2 and slightly North of Monument No. 3 and that which is said to be approximately equal to the *distance* between the bank and *"the line of deepest water"* is very nearly *one thousand feet*; yet when the Commission comes to locate the line on the Mississippi side in Sections 35, 3, 10, 11 and 12 where a meander line in Mississippi is shown, and, also, the same high bank described, yet in Section 35, this channel almost, if not al-

together, *touches* the Mississippi high bank. It is erroneous to have allowed to Arkansas a distance "approximately equal to that which is ordinarily found between the main bank and the line of deepest water," equal to 600 to 1000 feet and when it comes to Mississippi, from the intersection with the meander line at the North down to the point at which the alleged boundary turns north to go to Monument No. 3, there is not a single place which approximates more than one-fourth or one-third the distance allowed to Arkansas as *being equal to the distance ordinarily found between the main bank and the line of deepest water.*

As found by the Commission, the line of deepest water lies approximately 600 to 1,000 feet off of the concave shore, so found for Arkansas at the Northern part of this line without record evidence, however.

Now, although this is the case *ordinarily*, without any explanation or differentiation, or reason therefor, the *ordinary* rule is departed from, and, an *extraordinary rule* made, applicable in Horseshoe Lake, and its environs, by which the line is thrown almost under the bank.

If *ordinarily* the line thus runs 600 to 1,000 feet off shore, it should be made to so run in this case for Mississippi when it is so made to run for Arkansas. In other words, if ordinary rules govern Arkansas at the point where the avulsion actually occurred, and the River actually cut through, then it ought to govern for Mississippi, where it did not actually cut through and where the subsequently occurring circumstances are in no wise detailed.

The just solution of this cause, is to divide, equally, this territory between the fixed banks between Arkansas and Mississippi as the law by presumption does.

Great stress was laid upon the location of certain trees, but these trees may have been located upon islands. No one can tell but what June overflows may have caused two rings to be made where but one would

normally be expected. Speculations of forestry experts are no more entitled to consideration than speculations of geologists in locating the traffic channel. In order to find this line as now said to be run, there is nothing in the record but speculation pure and simple, wholly inadequate to overcome the presumption.

The solemn act of Mississippi and Arkansas is set at naught to vouchsafe equal rights of navigation in a dry channel. It may well be that when the water was flowing therein, the right of navigation would have been inestimable, but, as pointed out in this brief, that channel is obscure, sinuous and constantly changing, and is in this record nothing upon which to identify the channel to be located, no expert boatmen have testified.

In other words, Col. Ockerson, together with all of the Complainant's experts, located the channel as shown upon Exhibit 1 to R. L. Dabney's testimony from Point 3 up to Friars Point, and the Commission appointed by the Court, these experts to the contrary notwithstanding, discredited fifty *per cent.* of the location so made by Col. Ockerson and the other experts, and one hundred *per cent* by making it run straight and not curved.

Now, if these experts could not locate the channel to the satisfaction of the Commission, who were not experts, and there being a difference between the experts and the Commission as to the channel located, the rule enunciated and adopted by this Court in *Iowa v. Illinois,* should be applied when so to do will conform to the rule acted on by Mississippi and Arkansas.

In fine, the Commission and the experts differ as to the line, and can this Court, without any evidence as to where the line should be located as to certainly, the east fifty *per cent.* of it, adopt the finding when in conflict with the line as run by Col. Ockerson and the other engineers?

This Court said in the opinion:

"We are unable to find occasion to depart from this rule because of long acquiescence in enactments and

decisions and the proof of the inhabitants of the disputed territory in recognition of a boundary which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. See *Arkansas v. Tenn.*, supra, and the cases cited at page 172.

Now we have in this case, as developed by the Commission's report, just such a situation. There never was a condition in which the true boundary line was more difficult to ascertain; wherein consider:

(a) Character of traffic;

(b) Time of fixation;

(c) Location of two islands;

(d) Subsequent circumstances integrated;

(e) Difficulty in delineation;

(f) Number of channels.

And, therefore, with each of these factors, we refer to *Rhode Island v. Massachusetts*, 4 How., 638, where it said:

"For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in the case of disputed boundary."

In the instant case, the States each adopted by their respective Constitutions, the interpretation of the treaties which they deemed proper and the line that *prima facie* is equidistant between the fixed banks. These constructions have been uniform, the one since 1817, and the other since 1836, and each State under repeated judicial decisions has laid claim to that territory which is described in and by the several Constitutions, as that to which each was entitled and no more. The location else-

where of the traffic channel alone could alter this. But there is no evidence of any such traffic channel, and its location now is an impossibility.

See *Indiana v. Kentucky*, 136 U. S., p. 479.

Against this practical construction, we have a line delineated which is based upon speculations of experts in which the Commission has, in part, concurred, and from which it has in part dissented, and, with greatest deference, we insist that: "Apart from these speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a State, the tract was attached to and formed a part of the territory then ceded out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the main land of Indiana so as to justify its designation as an island in the river." *Indiana v. Kentucky*, supra.

In *Virginia v. Tennessee*, 148 U. S., 503, the Court said:

> "Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn. v. Lord Baltimore*, 1 Ves. Sr., 444,443; *Boyd v. Graves*, 17 U. S., 4 Wheat., 513; *Rhode Island v. Massachusetts*, 37 U. S., 12 Pet., 657, 734; *United States v. Stone*, 69 U. S., 2 Wall, 525, 527; *Kellogg v. Smith*, 7 Cush., 375, 382; *Chenery v. Waltham*, 8 Cush. 327. *Hunt Boundaries* (3rd Ed.), 306."

See, also, *Louisiana v. Mississippi*, 202 U. S., 53. In *Maryland v. West Virginia*, 217 U. S., 1, there was

a controversy as to the boundary line between Maryland and West Virginia, and it there appeared that the contention of Maryland with reference to the headquarters of the Potomac was correct; but that, notwithstanding the line had formerly been run for years from the so-called Fairfax Stone, and notwithstanding the terms of the treaty gave title to the so-called Potomac meridian, yet this Court gave title under the practical interpretation placed thereon by the parties.

What could be more important than to establish it in the present case? And as said in *Wheaton on International Law*:

> "The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Pt. 2, Chap. 4, Sec. 164."

Avulsions do not change boundaries, and the factors to be integrated therein are not in this record; so as to depart from the rule laid down in *Iowa v. Illinois* where due to the fact that the channel of the Mississippi River is remarkably winding, crossing and re-crossing perpetually from one side to the other, in absence of proof as to its location, presumption attaches that it is equidistant between the fixed banks; and, in the instant case, there is naught to cause the line to be otherwise located. In short, the presumption being in accordance with the long continued acts of the parties, fixes this line with a certainty at this point. The traffic channel is presumed to follow this *medium filum aquae* until the contrary is

shown; not being shown, the presumption still controls. Mississippi does not seek now to controvert the middle of the main navigable channel as being the true dividing line under the treaties, but it does contend that where, as here, that line is not shown, then the Court must do the next best thing and revert to the middle of the stream as defined by the fixed banks—especially as upon controverted facts—the party in interest having been before the Court it was so found. *Rust Land & Lumber Company v. Jackson*, No. 171, October Term 1918. The right to navigate has ceased, the only question is the partition of dry land, and such land is not so circumstanced as to allow the tracing of the traffic channel thereon. With deference, the line is not properly run, and the Court should adopt, by reason of inadequate proof to overcome the presumption, the line equidistant between the fixed banks. If Arkansas had filed this suit in 1850, then the line could have been run without difficulty; but instead she has waited until those who knew have gone, and then filing suit seeks to profit by their absence by attempting to adopt a deep water channel as the traffic channel, without disclosing, by proof of each of those facts, absolutely essential to transform a deep water channel into a traffic channel. As a deep water channel, this line was not the boundary, as a traffic channel it would have been; but there is no proof to transform it from one into the other.

With deference the report should not be confined and the cause should be remanded to rules to adopt the course pointed out in *State v. Keane*, 84 Mo. App., supra, where this Court said:

> "But the expression that the boundary will remain in the center from bank to bank of the old river bed is correct in all those cases where no showing has been made of where the navigable channel was. For, in the absence of proof on that subject, it will be taken to be in the center of the old bed located from bank to bank. Creasey's First Platform on International Law, Section 231; *Iowa v. Illinois*, Supra."

Therefore, we submit, that the line must in this case be run to accord with the fixed usages of Mississippi and Arkansas, as embodied in the Constitution of the respective states for more than three quarters of a century; not because this rule of *Illinois v. Iowa* is not applicable but because it controls and delineates, in this case, the line as equi-distant between the fixed banks.

POINT VI.

The report should be set aside and a new Commission named, because of the conduct of the Rust Land and Lumber Company in making payment to Commissioners of amounts, not agreed upon by Mississippi, at a time when Mississippi was unable to pay by reason of want of any appropriation, and the payment of the amount, by Mississippi, was deemed excessive.

Neither Arkansas nor Mississippi have made any payments; it appears that a full payment has been made nevertheless, which is to be credited to Arkansas. We assume that this payment was made by the Rust Land and Lumber Company as it appears to be the sole party in interest at the point in question, so far as Arkansas is concerned. The question presented is as to the effect of a payment by a party, not of record to the Commissioners, as compensation before a fixation thereof by this Court, when the amount paid is in excess of that which Mississippi deems adequate. The proper method, with deference, is that outlined by the final decree of this Court in *Missouri v. Nebraska*, 197 U. S. 618, where it is said:

> "And it is further ordered that said commissioners be paid for their services herein such compensation as may be agreed upon by the respective parties to this suit and said commissioners, and if the parties to this suit and said commissioners are unable to agree upon said compensation" the Court was to fix the Compensation.

Under the constitution of Mississippi, no appropriation of funds can be made but by the Legislature, and that has not been in session now for nearly two years so that there were no funds that were available. In this condition, a party not of record pays the Commission an amount which in the opinion of the State of Mississippi, at least, is too large. This payment has already been allowed by the Commissioners to themselves and paid, so that the Commission is of necessity prejudiced against the contentions of Mississippi, who has not paid but furthermore contends that the payment is too large. Thereby the Commission has become a judge in its own case, and has received a payment from a person, who was not a party to the litigation but who was to be and has been advantaged by the report that has been filed. Under these circumstances the Commission should be discharged and another appointed, because by so receiving compensation, with deference we submit, they disqualified themselves from service. They were in the pay of an uninterested party, and, irrespective of what the Commission intended, and what they knew, the fact remains that this payment, contended to be too large, has been made, and made by a person who was without right to make it, and at a time when the Commission was without right to receive it, and thus they became disqualified from further action in the premises.

The amount of the compensation paid to Mr. Gannett was $1525.00, to Mr. Archer, less certain items not shown, $1782.68, and to Mr. Miller, $1335.21, less certain amounts not detailed. There was, so far as we can find no order of this Court for this payment, but the allowance was made by the Commission to its several members. Under the rule that no man shall be a judge in his own cause, this, with deference we submit, was improper, and rendered it essential that a new Commission should be named.

It is highly essential that the administration of justice should not allow a party, not of record, to make payments, before formal allowance of compensation by the Court; for while it may be that there is no intention to wrong any person by the receiving of compensation from a party not of record in this case, still the party making the payment, while not of record, was vitally interested in the outcome of the cause, and this interest was that which operated to cause this advance to be made. We do not know that the Commission even knew wherefrom the payment was made, but we do know that it was not made by either Arkansas or by Mississippi, and the effect of the payment is that which must not be overlooked. Mississippi had been unable to make the allowance because there was no law under which the money could be taken from the Treasury, and in the case of *Virginia v. West Virginia,* this Court was careful to make no order until the Legislature of West Virginia had had an opportunity to act, and so here, there should have been no disadvantage placed upon the State of Mississippi by allowing a payment to be made for the account of Arkansas at a time when Mississippi was unable and thereby give the benefit of one State seeming to pay while the other did not. It may not have caused any difference in the report, but the report, unfortunately was adverse to Mississippi and favorable to the State for whose account the payment was made, which, with deference, renders it essential, especially as the very right to be heard was denied to Mississippi, that there should be a new reference to another Commission. If the report had been in favor of Mississippi when that State had not made the payment, another question would have been presented, but when it was in favor of the State for whose account the payment was made, it is essential that it should be set aside so that Mississippi might be heard. Of course, it may be a mere coincidence, but it will be recalled that due to an unfortunate difference Arkansas named two of the Commission that has decided this cause. Add that to the facts which we have brought to the Courts attention and the result is inevitable.

See *McGuire v. Blount*, 199 U. S. 142; *Slacum v. Sims* 5 Cr. 363.

It is absolutely essential that there shall be no reward whatever given the Judges by the party to the litigation—It would be highly improper if there should be a conflict between the parties as to the compensation to be fixed, and all that could be done would have been to have filed the report, with the amount paid to others than the Commission, and then let the Court make the allowance. Instead of so doing, a course has been pursued where a party in interest but not of record has made the payment of an amount that seems to the State of Mississippi to be too much and was made at a time when the State was without funds to that end, therefore there was such a condition brought about that the report must be set aside and another Commission named, or if not, then the Court must, with deference, recommit the report with instructions not inconsistent with the contentions herein made, so that the State of Mississippi may be by the Commission heard, her evidence considered, and the finding of fact that is to be reported to this Court arrived at after due consideration of the contentions that she has brought to present herein.

We, also, refer to the briefs filed upon this cause at the prior hearing for collation of authorities applicable to divers of the aspects here contended for but which have not been quoted at length here to avoid prolixity.

Respectfully submitted,

FRANK ROBERSON, *Att'y.-General.*
MARCELLUS GREEN,
GERALD FITZGERALD,
GEORGE F. MAYNARD,
GARNER WYNN GREEN,

Attorneys for State of Miss.